

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs June 27, 2006

**STATE OF TENNESSEE v. CHRISTOPHER DOUGLAS MILLER**

**Appeal from the Criminal Court for Cumberland County**  
**No. 7700     Leon Burns, Jr., Judge**

---

**No. E2005-01710-CCA-R3-CD - Filed July 7, 2006**

---

The defendant, Christopher Douglas Miller, appeals the Cumberland County Criminal Court's revocation of his judicial diversion and imposition of a sentence for misdemeanor assault of 11 months, twenty-nine days in jail. He contends that the evidence fails to prove he committed the trespass that resulted in the revocation and that his sentence is excessive. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Kevin R. Bryant, Crossville, Tennessee, for the appellant, Christopher Douglas Miller.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; William Edward Gibson, District Attorney General; and Douglas E. Crawford, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

Following an incident of domestic discord between the defendant and his then-wife, the defendant was indicted for aggravated assault. At the trial, the jury found the defendant guilty of the lesser offense of misdemeanor assault. Following the trial, the parties struck an agreement which allowed the defendant to request judicial diversion without opposition from the state. The trial court granted the defendant's request.

One week before the grant of judicial diversion, the defendant was involved in an encounter with Denise Melton, the owner of the preschool his young daughter attended. The defendant attempted to convince Ms. Melton that it was acceptable for children to be around guns. He used a "razor knife" to reenact how he had demonstrated the instrument to his daughter. As he was displaying the knife, he began questioning Ms. Melton about her testimony favoring the defendant's

wife during recent divorce proceedings and stated that he would “get” Ms. Melton if she had committed perjury. Ms. Melton felt threatened, and her husband, Mark Melton, told the defendant to leave the preschool premises and not to return.

Approximately three months into the diversion period, the defendant returned unannounced to the preschool and requested a copy of his daughter’s attendance records. Ms. Melton told him that her copy machine was broken and that she would provide him with the records at a later date. The defendant asked to eat lunch with his daughter, and Ms. Melton told him that he could not come back to the preschool unless she, Mr. Melton, and the defendant had a parent/teacher conference to discuss the defendant’s behavior three months earlier. The defendant attempted to record the conversation with his cell phone. Ms. Melton asked him to turn the cell phone off, and he refused. She told him to leave the premises or she would call 9-1-1, and he refused. She went to another room to use the telephone, and when she returned the defendant was on the front porch using his cell phone. The police arrived, and the defendant left the preschool. Ms. Melton later sought a criminal trespass warrant against the defendant, and the matter came to the attention of his probation officer, who filed a revocation warrant against him.

At the revocation hearing, the state presented its proof of the violation via the testimony of the defendant’s probation officer, Ms. Melton, and Mr. Melton. The defendant chose not to offer proof. The court found that the defendant had violated the terms of his diversion and revoked his judicial diversion status.

Thereafter, the court conducted a sentencing hearing, at which it sentenced the defendant to serve his eleven month, twenty-nine day sentence in confinement, with a seventy-five percent release eligibility. The court found that the defendant had been afforded prior leniency to no avail and that any additional leniency in a second grant of probation would not result in a more favorable outcome.

## I

First, the defendant takes issue with the trial court’s decision to revoke his judicial diversion. He claims that there is insufficient evidence that he committed the crime of criminal trespass, the charge upon which the revocation warrant was based. The state disagrees.

Judicial diversion is a statutory creature whereby the trial court defers further proceedings and places an eligible defendant on probation without entering a judgment of guilt. T.C.A. § 40-35-313(a)(1)(A) (Supp. 2005). The probationary period may be subject to reasonable conditions and may last for a period of time up to the maximum sentence length for the offense. Id. A defendant who successfully completes the probationary term is discharged, and the proceedings against the defendant are dismissed. Id. at (2). On the other hand, a defendant who fails to abide by the terms of his or her diversionary probation faces entry of an adjudication of guilt and resumption of the proceedings. See id. When a defendant fails to comply with the terms of diversion, the procedure to be followed is that applicable to probation revocation proceedings. See State v. Johnson, 15 S.W.3d 515, 519 (Tenn. Crim. App. 1999) (citing T.C.A. § 40-35-311(a)).

Relative to when a trial court may revoke probation and to the standard of review in an appeal of such an action, in State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991), our supreme court stated:

We take note that a trial judge may revoke a sentence of probation or a suspended sentence upon a finding that the defendant has violated the conditions of his probation or suspended sentence by a preponderance of the evidence. T.C.A. § 40-35-311. The judgment of the trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion. State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981). In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. State v. Gear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment. State v. Milton, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984).

The defendant was charged with violating his probation by committing the offense of criminal trespass. That offense may be committed by entering or remaining on property with knowledge that the person does not have the owner's effective consent to be on the premises. See T.C.A. § 39-14-405(a) (2003). Notice that the person does not have permission to be on the premises may be inferred from "[p]ersonal communication to the person by the owner or by someone with apparent authority to act for the owner[.]" Id. at (a)(1).

The trial court did not abuse its discretion in revoking the defendant's probation and terminating judicial diversion because the evidence does not preponderate against that court's finding that the defendant committed a trespass. The defendant went to the preschool where his daughter was enrolled after he had been told by the owner's husband three months earlier to leave and not to return. On the occasion in question, he was told to leave by the owner, and although he moved to the front porch, he did not leave the premises when told to do so. We are unimpressed with the defendant's claim he was there "for the legitimate purpose of acquiring records of his daughter." This overlooks the fact that he had been told he was no longer welcome on the property. He could have obtained these records without committing a trespass by calling Ms. Melton or writing her a letter, or he could have had his divorce attorney obtain them on his behalf. We are likewise unimpressed with the defendant's attempt to avail himself of the defense found in the criminal trespass statute. That defense is applicable when three conditions are met:

- (1) The property was open to the public when the person entered and remained;
- (2) The person's conduct did not substantially interfere with the owner's use of the property; and
- (3) The person immediately left the premises upon request.

Id. at (b)(1) - (3). The property in question was a business open to the public, satisfying the first of the three requirements. However, the second and third criteria of this defense are not met. Ms. Melton testified that she was afraid while the defendant was on the property without her consent. In addition, having to alert the authorities to the presence of an intruder in a location where young children were present must have been a substantial interference with Ms. Melton's use of the property. Furthermore, the defendant did not leave the premises immediately upon request. This defense is not applicable.

## II

The defendant also claims that the trial court imposed too harsh a sentence in light of the defendant's lack of prior criminal history and otherwise positive performance on probation. The state counters that the trial court properly relied on the circumstances of the offense and the defendant's probation violation while on judicial diversion as evidence of the lack of success of prior less restrictive measures.

Appellate review of misdemeanor sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d), -402(d) (Supp. 2005). This presumption of correctness is conditioned upon the affirmative showing that the trial court considered the relevant facts, circumstances, and sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to section 40-35-401(d) note, the burden is now on the appealing party to show that the sentence is improper.

When imposing a misdemeanor sentence, the trial court is not required to conduct a sentencing hearing, but it must afford the parties a reasonable opportunity to address the length and manner of service of the sentence. T.C.A. § 40-35-302(a) (2003). The trial court must impose a specific sentence in terms of the months, days, or hours to be served. Id. at (b). Then, the trial court must set the percentage of the sentence that the defendant is to serve in incarceration before being considered for various rehabilitative programs. Id. at (d). We note that the law provides no presumptive minimum for misdemeanor sentencing. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Moreover, in misdemeanor sentencing, the trial court is not required to place specific findings on the record. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998). However, the trial court must consider the purposes and principles of the Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-302(d); see Troutman, 979 S.W.2d at 274 (holding that "while the better practice is to make findings on the record when fixing a percentage of a defendant's sentence to be served in incarceration, a trial court need only consider the principles of sentencing and enhancement

and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute”).

In ordering the defendant to serve his sentence in jail, rather than partially or completely probating the sentence, the trial court observed that the defendant had been shown past leniency in the criminal justice system, yet he had not conformed his conduct to the law. In addition to the evidence regarding the trespassing incident at the preschool during the diversionary period, the evidence at the sentencing hearing showed several juvenile adjudications for acts of stalking, disorderly conduct, violation of a restraining order, and possession of a knife with the intent to go armed. The defendant had completed a year of juvenile probation. The court gave this evidence more weight than it did the evidence of the defendant’s generally positive efforts in other aspects of complying with the terms of probation while on judicial diversion. The court concluded that the defendant had “worn out the system” and was not deserving of another chance on probation.

The trial court’s observations reflect that it was mindful of the purposes and principles of the Sentencing Act. We conclude its factual findings are supported by the record. The defendant makes only a general assertion that the sentence was not warranted given his “lack of prior history and otherwise compliant behavior.” The criminal trespass incident was a significant instance of a probation violation. Further, the defendant does have a prior history in the form of repeated juvenile adjudications and juvenile probation. The defendant cannot overcome the presumptive correctness of the trial court’s sentencing determination in the face of this evidence.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

---

JOSEPH M. TIPTON, JUDGE